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# In The Supreme Court of The United States

OCTOBER TERM 1963

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GEORGE ANTHONY ROSSETTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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GEORGE ANTHONY ROSSETTI,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, George Anthony Rossetti, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 6, 1963.

## CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of March 6, 1963, is not reported but is set forth in Appendix A, infra, pages 14-16.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 6, 1963 and is set forth in Appendix B, infra, page 17. A timely petition for rehearing filed April 5, 1963 was denied on April 16, 1963. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1), Rule 22 (2) Rules of the Supreme Court and Rule 37 (c) of Federal Rules of Criminal Procedure.

## QUESTIONS PRESENTED

1. Is it prejudicial error to allow the prosecution to call as a witness one involved in the offense with which accused is charged knowing the witness will claim a valid privilege against self-incrimination, particularly when the accused is precluded from cross-examination and the jury is not instructed concerning the effect of such testimony on the rights of the accused?

2. Should a motion for judgment of acquittal be granted where the evidence is slight, entirely circumstantial and consists only of innocent acts which point reasonably to the accused's innocence?

3. Should a new trial be granted in a close case where the accused discovers evidence after the trial

that tends to negate any inference of guilt arising from acts which the prosecutor contends constitute flight?

4. Is it constitutional to require one to declare, i.e., admit possession of, marijuana when to do so would give rise to a presumption of guilt under another Federal Statute?

## STATUTES INVOLVED

The statutory provisions involved are, 21 U.S.C. 176 (a), 26 U.S.C. 4744, and 26 U.S.C. 5841. They are printed in Appendix C, infra, pages 18-20.

## STATEMENT

Appellant and his co-defendants, JOSEPH PATRICK KASAMIS and PASQUALE FRANK CREA, were charged in a two count Indictment returned by the Grand Jury for the Southern District on March 14, 1962. In Count 1 co-defendant, JOSEPH PATRICK KASAMIS, was charged with the substantive crime under 21 U.S.C. 176 (a) of having imported thirty-five pounds of marijuana contrary to law and in Count 2 with having received, concealed and transported said marijuana. Appellant and co-defendant, PASQUALE FRANK CREA, were charged in each count with having aided, abetted, assisted, counseled, induced and procured the commission of the offenses under 18 U.S.C. 2.

Co-defendant, JOSEPH PATRICK KASAMIS, was separately tried by a jury and on April 12, 1962 was convicted of both counts of the Indictment. On June 29,

1962, four weeks after the conclusion of appellant's trial; KASAMIS was sentenced to imprisonment for a period of seven years on each count of the Indictment to run concurrently.

Appellant and his co-defendant, PASQUALE FRANK CREA, hereafter referred to as CREA, were jointly tried before a jury, commencing on May 29, 1962. At the conclusion of the government's case a motion for judgment of acquittal as to both counts of the Indictment was granted as to CREA. After the conclusion of all of the evidence, a motion for judgment of acquittal as to Count 2 of the Indictment was granted as to appellant. Appellant's motions for judgment of acquittal as to Count 1 were denied. On June 1, 1962 appellant was convicted by the jury as charged in Count 1 of the Indictment. Appellant's motions for judgment of acquittal as renewed after the verdict of the jury and for new trial were likewise denied and appellant was sentenced to seven years imprisonment. An appeal duly followed to the Court of Appeals for the Ninth Circuit which was denied. This petition seeks review of the court's action in denying the relief sought by appeal and the motion for rehearing which was duly presented.

The evidence adduced as to appellant during the trial was as follows:

On or about December 31, 1961, appellant left a 1952 Oldsmobile automobile at the Jet Center Motors in Lancaster, California. At that time appellant executed a consignment form and advised the co-owner of Jet Center Motors, Mr. Homer Bodun, that the car was to be sold for $150.00. The vehicle was on the car lot for "probably around thirty days". During this thirty day

period appellant was observed by Mr. Bodun "maybe two or three different times". CREA was observed with appellant at the lot on one or possibly two or three occasions. Thereafter the car was removed from the lot in some unknown manner. The car was registered to CREA and CREA'S ownership was established by the government in its response to appellant's motion for bill of particulars.

Appellant, KASAMIS and CREA were observed by a deputy sheriff "either the latter part of January or into February (1962) at the Wayside Cafe in Rosamond".

On February 20, 1962, two days before the offense and over 200 miles from the place where it occurred, appellant was observed talking to KASAMIS in front of the KASAMIS residence in Lancaster, California. Appellant and KASAMIS were observed departing in a red and white automobile at that time.

Later the same day, namely, February 20, 1962, KASAMIS was observed by a deputy sheriff driving the same 1952 Oldsmobile automobile. At this time the car was occupied by KASAMIS and CREA and was being driven toward Lancaster, California. A car registration was produced by CREA, which showed that CREA was the registered owner of said vehicle.

Appellant stipulated that he signed a registration card at the Holiday Inn Motel, San Ysidro, California. This card was identified as having been presented to the manager of said motel on the night of February 21, 1962 or in the early morning of February 22nd. Neither ROSSETTI nor any other individual was personally identified. Appellant's stipulation was the only evidence

tending to show he was even near the scene of the offense.

At or about 10:10 A.M. on February 22, 1962, KASAMIS was observed entering the United States from Mexico in said 1952 Oldsmobile. He had received the keys that morning in some unspecified manner. KASAMIS appeared to be extremely nervous and the car was thereafter searched. Marijuana was found on the floor mat of the back seat, under both fenders and in the trunk, which KASAMIS unlocked. A personal search of KASAMIS by a customs agent disclosed marijuana debris and seeds concealed in KASAMIS' pockets.

Appellant and his co-defendant, CREA, resided with their respective families at a multiple residence known as Actis Gardens, Mojave, California for over one year prior to February 22, 1962. Certain evidence was introduced by the government under an ostensible theory of flight. Said evidence tended to show that appellant's family moved from Actis Gardens on the afternoon of February 22, 1962, and returned to appellant's residence, Brooklyn, New York, where they lived in the same building with appellant's mother and brother.

Also, that appellant's daughter did not return to school after February 22, 1962 and that the school principal was not previously notified of her withdrawal from school. Appellant, in his motion for new trial, showed that the daughter's school teacher rather than the principal had been notified of a pending withdrawal during the week prior to February 22, 1962.

The government called KASAMIS as its first witness. Appellant's counsel, out of the hearing of the jury, promptly advised the court and government counsel

that KASAMIS had stated he would claim the privilege against self-incrimination and would not testify. KASAMIS asked for and received the right to consult with the attorney appointed for him by the court in connection with his own trial and defense. The witnesses' attorney, after consulting with his client, reiterated the claim of privilege and stated the grounds therefore, including that the witness had not been sentenced and therefore had not had an opportunity for appellate review, that he faced the real possibility of other prosecutions for conspiracy under 18 U.S.C. 371 and for tax violations under Title 26 of the United States Code.

The government, in apparent recognition of the validity of the claim, advised the court and counsel that immunity would be sought for the witness. However, this was not done and the government over appellant's objections, instead selected certain questions that had been previously asked of and answered by the witness when he testified, unsuccessfully, in his own defense. The three selected questions were:

> "Mr. Kasamis, did you enter the United States in a 1952 Oldsmobile, green and black, on Thursday morning, February 22, 1962?
>
> Did you open the trunk of that vehicle for a customs officer at that point?
>
> When did you receive the keys to that automobile which you were then operating?"

The witness was instructed by the Court to answer the questions after KASAMIS personally and through his

attorney refused to answer the questions. It is to be noted that the witness awaited sentence by this trial judge on his conviction of two counts where the penalty could have been as much as forty years or as little, comparatively speaking, as five years. Despite the coerced answers the privilege still existed and appellant's counsel could not cross examine the witness even though the transcript of the witness's testimony in his own trial showed that he had received the keys that morning from a man named Frank - not appellant. In fact, the witness exculpated appellant from any involvement in the offense but these facts could not be brought before the jury due to the claim validly asserted by the witness. Only the prejudicial inferences arising from the claim of privilege remained and these could not be rebutted. The government was quick to pounce on this evidence and compounded the error by arguing to the jury on five different occasions that appellant must have given the keys to the witness the morning of the offense.

## REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is directly contrary to the holdings in three other Circuits. The Second Circuit in U.S. v. Maloney (2 CA, 1958) 262 F. 2d 535 held that it is reversible error to allow the prosecutor to call as a witness one involved in the offense with which accused is charged knowing he will claim the privilege against self-incrimination where the court does not give a cautionary instruction to the jury even though the accused does not request the instruction. The Seventh Circuit in U.S. v. Amadio, 215 F. 2d 650 and the Third Circuit in U.S. v. Tucker 267 F. 2d 212 are in accord with the Second

Circuit and are contrary to the instant case in the Ninth Circuit.

The precise question was before the Supreme Court of Coloardo in De Gesualdio v. People, 364 Pac. 2nd 374, 86 ALR 2d 1434. The court there was in accord with the Second, Third and Seventh Circuits and directly contrary to the Ninth Circuit. As evidence of the importance of this question the editors of ALR selected it for inclusion in their recent annotation, 86 ALR 2d 1434. Appellant submits that the instant holding is contrary to the holdings in the cases therein collected. Also contrary to the instant case are U.S. v. Hiss, 185 F. 2d 519, Washburn v. State, 299 S.W. 2d 706, and Johnson v. State, 252 S.W. 2d 463.

The all too frequent practice of the prosecution calling a witness who is implicated with the accused in the offense knowing the witness will validly claim the privilege against self-incrimination should not be condoned. It results in a prejudicial inference against the accused in the mind of the jury which cannot be rebutted. The inference created is that the witness, who the prosecutor asserts is connected or associated in some manner with the accused, has done something that he must conceal for fear of prosecution. This is the only reason the witness is called if the prosecutor knows the witness will not testify. It is guilt by association of the worst kind. In this case the government's entire case rested upon the asserted association of the witness and appellant. The government argued this point time and again and certain of the evidence was admissible only under the theory of association.

The prejudicial effect of precluding the accused

from exercising his inherent legal right to cross-examine witnesses who testify against him is even more startling in the instant case. The court allowed the prosecutor to select several isolated questions to be asked of the witness and then ordered the witness to answer. Because of the constitutional guarantee being exercised by the witness, the appellant could not show by cross-examination or otherwise that, contrary to the government's theory, the witness received the keys from someone other than appellant and that appellant did not aid or abet the witness in any manner. Please note that the witness had already been found guilty as a principal and that appellant was on trial for aiding and abetting the witness in that offense.

The entire procedure resulted in a prejudicial inference coupled with a denial of the right of cross-examination. The prosecutor here, with full knowledge of the claim and after recognizing the validity thereof, persisted in pursuing the matter before the jury over appellant's continued objections. Appellant also moved to strike the testimony, made motions for a mistrial, acquittal and new trial, all of which were overruled or denied. The court failed to instruct or otherwise caution the jury concerning the procedure followed by the prosecutor although the need for an appropriate instruction was indicated to the court by appellant and all other objections and motions were duly made.

2. The standard to be applied by the trial court on a motion for judgment of acquittal varies among the several Circuits. The situation is similar to that which existed concerning the correct instruction on circumstantial evidence before this Court decided Holland v. U.S., 348 U.S. 121. Judge Bartels in summarizing the

various rules in U.S. v. Wapnick (1962 E.D. N.Y.) 202 F. Supp. 712 states that the so-called "Beyond a Reasonable Doubt" standard is followed by the District of Columbia Circuit, the Fifth Circuit and the Ninth Circuit while the Second, Third, Fourth, Sixth and Tenth Circuits follow the so-called "Substantial Evidence" test. The remaining circuits apparently follow independent and differing standards.

One cannot glean from the opinion below what standard, if any, was applied as the Court merely stated "While a close case is presented, we cannot conscientiously state there is insufficient substantial, though circumstantial, evidence from which the jury could not have found defendant guilty." Appellant submits that the motion for judgment of acquittal would, as a matter of law, have been granted had the court below followed the reasoning and rule set forth by the Fifth Circuit in Cuthbert v. U.S. (1960) 278 F. 2d 220. The only evidence on matters prior to the offense tending to show that appellant aided and abetted KASAMIS was (1) association of an innocent nature on two occasions 200 miles from the place of offense, the first in January, 1962 and the second on February 20, 1962, (2) placing for sale on a car lot the instrumentality of the offense, i.e. the vehicle used by KASAMIS and owned by CREA, and (3) appellant's stipulation that he signed a registration card which was presented to a motel near the place of offense the night before. The Trial Court shortly before the conclusion of the evidence characterized the case against appellant and his acquitted co-defendant CREA as being "mere suspicion."

3. The prosecutor, under the theory of flight, introduced evidence of the moving of appellant's family from their residence in Mojave, California, to their home in Brooklyn, New York, after the offense. The

principal of the school where appellant's daughter attended testified that school records did not show any advance notice of withdrawal. Appellant, in his motion for new trial, produced the signed statement of the teacher of appellant's daughter that appellant's wife had advised the teacher on the preceding week that the daughter would be removed from school. Appellant's wife was in New York during trial and the facts pertaining to the prearranged departure procedure were not known or available to appellant. In addition, signed statements were presented from other prospective witnesses that they had been advised of appellant's intention to return to New York well before the date of the offense.

In a case such as this where the evidence is slight and entirely circumstantial, acts otherwise minor loom large indeed. Over fifty percent of the government case dealt with appellant's alleged flight. On a new trial the inference, if any, of guilt could be negated and an acquittal would undoubtedly follow.

4. Appellant contends that 21 U.S.C. 176 (a) is unconstitutional as requiring one to declare, i.e. admit possession of, marijuana which possession is presumptive evidence of guilt under 26 U.S.C. 4744. The Ninth Circuit in Russell v. U.S. 306 F. 2d 402 held 26 U.S.C. 5841 unconstitutional as it required one to register firearms, the possession of which gave rise to a presumption of guilt under 26 U.S.C. 5841. It is submitted that if it is unconstitutional to require the registration of firearms, the possession of which is presumptive evidence of guilt, it is equally unconstitutional to require the declaration of marijuana, the possession of which gives rise to a presumption of guilt under another federal statute.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER J. HUGHES
HARRY D. STEWARD

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| GEORGE ANTHONY ROSSETTI, Appellant, | ) | |
| vs. | ) | No. 18,255 |
| UNITED STATES OF AMERICA, Appellee. | ) | March 6, 1963 |

Appeal from the United States District Court
for the Southern District of California,
Southern Division

Before: BARNES and JERTBERG, Circuit Judges, and PENCE, District Judge

PER CURIAM:

This is an appeal from a conviction by a jury of knowingly aiding and abetting one Kasamis in smuggling thirty-five pounds of marijuana into the United States, 21 U.S.C. § 176(a); 18 U.S.C. § 2. The first point urged is the alleged insufficiency of the evidence to convict.

We have carefully reviewed the evidence introduced in the court below, the arguments made, and all instructions. While a close case is presented, we cannot conscientiously state there is insufficient substantial, though circumstantial, evidence from which the jury could not have found defendant guilty. The facts do not approach those found in Glover v. United States, 10 Cir. 1962, 306 F.2d 594, and are more nearly similar to those found in O'Neal v. United States, 9 Cir. 1962, 310 F.2d 175.

Appellant likewise claims error in the refusal to grant a new trial, because (a) the court admitted evidence relative to "flight," (b) failed to stri such evidence, and (c) instructed the jury on the theory of "flight." We find no error. Flight does not create a presumption of guilt (McFarland v. United States, 5 Cir. 1960, 273 F.2d 417, but: " 'It is today universally conceded that the fact of an accused's flight . . . /is/ . . . admissible as evidence of consciousness of guilt, and thus of guilt itself.' " Green v. United States, D.C.Cir. 1958, 259 F.2d 180, quoting 2 Wigmore, Evidence, § 276 (3d ed.). Having placed the appellant at the border motel between midnight and 6:00 A.M. on the morning of the smuggling, appellant's actions (after the government's discovery of the smuggling attempt) in traveling two hundred miles to his then residence, precipitiously packing and leaving his rented premises, taking his daughter out of school, and departing from the state with his close friend, Crea, were all facts for the jury to weigh and ponder, and to determine the weight which should be attached to each, if any.

Appellant next urges error because the trial judge (a) permitted defendant Kasamis (previously convicted

of the smuggling) to testify (as he had done at his own trial), by answering three questions, and (b) failed to instruct the jury on such testimony. Any objection to either procedure was waived. No instructions, cautionary or otherwise, were proffered or objected to.

Finally appellant claims 21 U.S.C. § 176 (a) is unconstitutional. We have held otherwise in Caudillo v. United States, 1958, 253 F. 2d 513, and we are given no reason to rule otherwise.

Finding no error, we Affirm.

(Endorsed) Per Curiam Opinion Filed March 6, 1963.

Frank H. Schmid, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ANTHONY ROSSETTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 18255

JUDGMENT

APPEAL from the United States District Court for the Southern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 6, 1963

United States Code, Title 21, § 176a.

§ 176a. Smuggling of marihuana; penalties, evidence; definition of marihuana

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570.

United States Code, Title 26

§ 4744. Unlawful possession.

(a) Persons in general. - It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) - -

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or is delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a). As amended July 18, 1956, c. 629, Title I, § 101, 70 Stat. 567.

U. S. Code, Title 26

§ 5841. Registration of persons in general

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with. Aug. 16, 1954, 9:45 a. m., E.D.T., c. 736, 68A Stat. 725.